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### Subpart A—General Provisions

#### § 2700.1 Scope; applicability of other rules; construction.

(a) *Scope.* This part sets forth rules applicable to proceedings before the Federal Mine Safety and Health Review Commission and its Administrative Law Judges.

(b) *Applicability of other rules.* On any procedural question not regulated by the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq. (“the Act”), these Procedural Rules, or the Administrative Procedure Act (particularly 5 U.S.C. 554 and 556), the Commission and its Judges shall be guided so far as practicable by the Federal Rules of Civil Procedure and the Federal Rules of Appellate Procedure.

(c) *Construction.* These rules shall be construed to secure the just, speedy and inexpensive determination of all proceedings, and to encourage the participation of miners and their representatives. Wherever the masculine gender is used in these rules, the feminine gender is also implied.

#### § 2700.2 Definitions.

For purposes of this part, the definitions contained in section 3 of the Act, 30 U.S.C. 802, apply.

#### § 2700.3 Who may practice.

(a) *Attorneys.* Attorneys admitted to practice before the highest court of any State, Territory, District, Commonwealth or possession of the United States are permitted to practice before the Commission.

(b) *Other persons.* A person who is not authorized to practice before the Commission as an attorney under paragraph (a) of this section may practice before the Commission as a representative of a party if he is:

- (1) A party;
- (2) A representative of miners;
- (3) An owner, partner, officer or employee of a party when the party is a labor organization, an association, a partnership, a corporation, other business entity, or a political subdivision; or

(4) Any other person with the permission of the presiding judge or the Commission.

(c) *Entry of appearance.* A representative of a party shall enter an appearance in a proceeding under the Act or these procedural rules by signing the first document filed on behalf of the party with the Commission or Judge; filing a written entry of appearance with the Commission or Judge; or, if the Commission or Judge permits, by orally entering an appearance in open hearing.

(d) *Withdrawal of appearance.* Any representative of a party desiring to withdraw his appearance shall file a motion with the Commission or Judge. The motion to withdraw may, in the discretion of the Commission or Judge, be denied where it is necessary to avoid undue delay or prejudice to the rights of a party.

[58 FR 12164, Mar. 3, 1993, as amended at 64 FR 48712, Sept. 8, 1999]

#### § 2700.4 Parties, intervenors, and amici curiae.

(a) *Party status.* A person, including the Secretary or an operator, who is named as a party or who is permitted to intervene, is a party. In a proceeding instituted by the Secretary under section 105(c)(2) of the Act, 30 U.S.C. 815(c)(2), the complainant on whose behalf the Secretary has filed the complaint is a party and may present additional evidence on his own behalf. A miner, applicant for employment, or representative of a miner who has filed a complaint with the Commission under section 105(c)(3) or 111 of the Act, 30 U.S.C. 815(c)(3) and 821, and an affected miner or his representative who has become a party in accordance with paragraph (b) of this section, are parties.

(b) *Intervention—(1) Intervention by affected miners and their representatives.* Before a case has been assigned to a Judge, affected miners or their representatives shall be permitted to intervene upon filing a written notice of intervention with the Executive Director, Federal Mine Safety and Health Review Commission, 601 New Jersey Avenue, NW., Suite 9500, Washington, DC 20001. If the case has been assigned to a Judge, the notice of intervention shall be filed with the Judge. The Commission or the Judge shall mail forthwith a copy of the notice to all parties.

After the start of the hearing, affected miners or their representatives may intervene upon just terms and for good cause shown.

(2) *Intervention by other persons.* (i) Motions by other persons for leave to intervene shall be filed before the start of a hearing on the merits unless the Judge, for good cause shown, allows a later filing. The motion shall set forth:

(A) The interest of the movant relating to the property or events that are the subject of the proceeding;

(B) The reasons why such interest is not otherwise adequately represented by the parties already involved in the proceeding; and

(C) A showing that intervention will not unduly delay or prejudice the adjudication of the issues.

(ii) Such intervention is not a matter of right but of the sound discretion of the Judge. In denying a motion to intervene, the Judge may alternatively permit the movant to participate in the proceeding as *amicus curiae*.

(c) *Procedure for participation as amicus curiae.* Any person may move to participate as *amicus curiae* in a proceeding before a Judge. Such participation as *amicus curiae* shall not be a matter of right but of the sound discretion of the Judge. A motion for participation as *amicus curiae* shall set forth the interest of the movant and show that the granting of the motion will not unduly delay or prejudice the adjudication of the issues. If the Judge permits *amicus curiae* participation, the Judge's order shall specify the time within which such *amicus curiae* memorandum, brief, or other pleading must be filed and the time within which a reply may be made. The movant may conditionally attach its memorandum, brief, or other pleading to its motion for participation as *amicus curiae*.

[58 FR 12164, Mar. 3, 1993, as amended at 67 FR 60862, Sept. 27, 2002]

**§ 2700.5 General requirements for pleadings and other documents; status or informational requests.**

(a) *Jurisdiction.* A proposal for a penalty under section 110, 30 U.S.C. 820; an answer to a notice of contest of a citation or withdrawal order issued under section 104, 30 U.S.C. 814; an answer to

a notice of contest of an order issued under section 107, 30 U.S.C. 817; a complaint issued under section 105(c) or 111, 30 U.S.C. 815(c) and 821; and an application for temporary reinstatement under section 105(c)(2), 30 U.S.C. 815(c)(2), shall allege that the violation or imminent danger took place in or involves a mine that has products which enter commerce or has operations or products that affect commerce. Jurisdictional facts that are alleged are deemed admitted unless specifically denied in a responsive pleading.

(b) *Where to file.* Until a Judge has been assigned to a case, all documents shall be filed with the Commission. Documents filed with the Commission shall be addressed to the Executive Director and mailed or delivered to the Docket Office, Federal Mine Safety and Health Review Commission, 601 New Jersey Avenue, NW., Suite 9500, Washington, DC 20001; facsimile delivery as allowed by these rules (see § 1700.5(d)), shall be transmitted to (202) 434-9954. After a Judge has been assigned, and before he issues a decision, documents shall be filed with the Judge at the address set forth on the notice of assignment. Documents filed in connection with interlocutory review shall be filed with the Commission in accordance with § 2700.76. After the Judge has issued his final decision, documents shall be filed with the Commission.

(c) *Necessary information.* All documents shall be legible and shall clearly identify on the cover page the filing party by name. All documents shall be dated and shall include the assigned docket number, page numbers, and the filing person's address and telephone number. Written notice of any change in address or telephone number shall be given promptly to the Commission or the Judge and all other parties.

(d) *Manner and date of filing.* A notice of contest of a citation or order, a petition for assessment of penalty, a complaint for compensation, a complaint of discharge, discrimination or interference, an application for temporary reinstatement, and an application for temporary relief shall be filed by personal delivery, including courier service, or by registered or certified mail,

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return receipt requested. All subsequent documents that are filed with a Judge or the Commission may be filed by first class mail, express mail, or personal delivery. Express mail includes delivery by a third-party commercial carrier. When filing is by personal delivery, filing is effective upon receipt. When filing is by mail, filing is effective upon mailing, except that the filing of a petition for discretionary review, a petition for review of a temporary reinstatement order, a motion for extension of time, and a motion to exceed page limit is effective upon receipt. See §§ 2700.9, 2700.45(f), 2700.70(a), (f), and 2700.75(f). Filing by facsimile transmission is permissible only when specifically permitted by these rules (see §§ 2700.9, 2700.45(f), 2700.52, 2700.70(a), (f), and 2700.75(f)), or when otherwise allowed by a Judge or the Commission. Filing by facsimile transmission is effective upon receipt.

(e) *Number of copies.* In cases before a Judge, two copies shall be filed for each docket; in cases before the Commission, seven copies shall be filed; but if the filing party is not represented by a lawyer or other representative, one copy shall be sufficient. When filing is by facsimile transmission, the appropriate number of non-facsimile copies must be filed with the Judge or Commission within 3 days of the facsimile transmission.

(f) *Form of pleadings.* All printed material shall appear in at least 12 point type on paper 8½ by 11 inches in size, with margins of at least one inch on all four sides. Text and footnotes shall appear in the same size type. Text shall be double spaced. Headings and footnotes may be single spaced. Quotations of 50 words or more may be single spaced and indented left and right. Excessive footnotes are prohibited. The failure to comply with the requirements of this paragraph or the use of compacted or otherwise compressed printing features will be grounds for rejection of a brief.

(g) *Status or informational requests.* Any inquiries concerning filing requirements, the status of cases before the Commission, or docket information shall be directed to the Office of General Counsel or the Docket Office of the Federal Mine Safety and Health Re-

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view Commission, 601 New Jersey Avenue, NW., Suite 9500, Washington, DC 20001..

[58 FR 12164, Mar. 3, 1993, as amended at 64 FR 48712, Sept. 8, 1999; 67 FR 60862, Sept. 27, 2002]

### § 2700.6 Signing of documents.

When a person who appears in a representative capacity signs a document, that person's signature shall constitute his certificate:

(a) That under the provisions of the law, including these rules and all federal conflict of interest statutes, he is authorized and qualified to represent the particular party in the matter; and

(b) That he has read the document; that to the best of his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for extension, modification, or reversal of existing law; and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

### § 2700.7 Service.

(a) *Generally.* A copy of each document filed with the Commission shall be served on all parties. In addition, a copy of a notice of contest of a citation or order, a petition for assessment of penalty, a discrimination complaint, a complaint for compensation, and an application for temporary relief shall be served upon the representative of miners, if known.

(b) *Posting.* A copy of an order, citation, notice, or decision required under section 109 of the Act, 30 U.S.C. 819, to be posted on a mine bulletin board shall, upon receipt, be immediately posted on such bulletin board by the operator.

(c) *Methods of service.* A notice of contest of a citation or order, a proposed penalty assessment, a petition for assessment of penalty, a complaint for compensation, a complaint of discharge, discrimination or interference, an application for temporary reinstatement, and an application for temporary relief shall be served by personal delivery, including courier service, or by

registered or certified mail, return receipt requested. All subsequent papers may be served by first class mail, express mail, or personal delivery, except as specified in §§ 2700.9, 2700.45, 2700.70(f), and 2700.75(f) (extensions of time, temporary reinstatement proceedings, and extensions of page limit). Express mail includes delivery by a third-party commercial carrier. Service by mail, including first class, express, or registered or certified mail, return receipt requested, is effective upon mailing. Service by personal delivery is effective upon receipt. When filing by facsimile transmission (see § 2700.5(d)), the filing party must also serve by facsimile transmission or, if serving by facsimile transmission is impossible, the filing party must serve by a third-party commercial overnight delivery service or by personal delivery. Service by facsimile transmission is effective upon receipt.

(d) *Service upon representative.* Whenever a party is represented by an attorney or other authorized representative who has entered an appearance on behalf of such party pursuant to § 2700.3(c), service thereafter shall be made upon the attorney or other authorized representative.

(e) *Proof of service.* All pleadings and other filed documents shall be accompanied by a statement setting forth the date and manner of service.

[58 FR 12164, Mar. 3, 1993, as amended at 64 FR 48713, Sept. 8, 1999]

#### § 2700.8 Computation of time.

In computing any period of time prescribed in these rules, the day from which the designated period begins to run shall not be included. The last day of the period so computed shall be included unless it is a Saturday, Sunday, or federal holiday, in which event the period runs until the end of the next business day. When the period of time prescribed is less than 7 days, intermediate Saturdays, Sundays, and federal holidays shall be excluded in the computation. When service of a document is by mail, 5 days shall be added to the time allowed by these rules for the filing of a response or other documents.

#### § 2700.9 Extensions of time.

(a) The time for filing or serving any document may be extended for good cause shown. Filing of a motion requesting an extension of time, including a facsimile transmission, is effective upon receipt. A motion requesting an extension of time shall be received no later than 3 days prior to the expiration of the time allowed for the filing or serving of the document, and shall comply with § 2700.10. A motion requesting an extension of time and a statement in opposition to such a motion may be filed and served by facsimile. The motion and any statement in opposition shall include proof of service on all parties by a means of delivery no less expeditious than that used for filing the motion, except that if service by facsimile transmission is impossible, the filing party shall serve by a third-party commercial overnight delivery service or by personal delivery.

(b) In exigent circumstances, an extension of time may be granted even though the request was filed after the designated time for filing has expired. In such circumstances, the party requesting the extension must show, in writing, the reasons for the party's failure to make the request before the time prescribed for the filing had expired.

[64 FR 48713, Sept. 8, 1999]

#### § 2700.10 Motions.

(a) An application for an order shall be by motion which, unless made during a hearing or a conference, shall be made in writing and shall set forth the relief or order sought.

(b) Written motions shall be set forth in a document separate from other pleadings.

(c) Prior to filing a procedural motion, the moving party shall confer or make reasonable efforts to confer with the other parties and shall state in the motion if any other party opposes or does not oppose the motion.

(d) A statement in opposition to a written motion may be filed by any party within 10 days after service upon the party. Unless otherwise ordered, oral argument on motions will not be heard. Where circumstances warrant, a

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motion may be ruled upon prior to the expiration of the time for response; a party adversely affected by the ruling may seek reconsideration.

[58 FR 12164, Mar. 3, 1993, as amended at 64 FR 48713, Sept. 8, 1999]

### § 2700.11 Withdrawal of pleading.

A party may withdraw a pleading at any stage of a proceeding with the approval of the Judge or the Commission.

### § 2700.12 Consolidation of proceedings.

The Commission and its Judges may at any time, upon their own motion or a party's motion, order the consolidation of proceedings that involve similar issues.

## Subpart B—Contests of Citations and Orders

### § 2700.20 Notice of contest of a citation or order issued under section 104 of the Act.

(a) *Who may contest.* (1) An operator may contest:

(i) A citation or an order issued under section 104 of the Act, 30 U.S.C. 814;

(ii) A modification of a citation or an order issued under section 104 of the Act; and

(iii) The reasonableness of the length of time fixed for abatement in a citation or modification thereof issued under section 104 of the Act.

(2) A miner or representative of miners may contest:

(i) The issuance, modification or termination of any order issued under section 104 of the Act; and

(ii) The reasonableness of the length of time fixed for abatement in a citation or modification thereof issued under section 104 of the Act.

(b) *Time to contest.* Contests filed by an operator pursuant to paragraph (a)(1) of this section shall be filed with the Secretary at the appropriate Regional Solicitor's Office or at the Solicitor's Office, Mine Safety and Health Division, Arlington, Virginia, within 30 days of receipt by the operator of the contested citation, order, or modification. Contests filed by a miner or representative of miners pursuant to paragraph (a)(2) of this section shall be

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filed in the same manner within 30 days of receipt by the miner or representative of miners of the contested order, modification, or termination.

(c) *Notification by the Secretary.* The Secretary, in accordance with section 105(d) of the Act, 30 U.S.C. 815(d), shall immediately advise the Commission of such notice of contest upon its receipt.

(d) *Copy to Commission.* The contesting party shall also file a copy of his notice of contest with the Commission at the time he files with the Secretary.

(e) *Contents of notice of contest.* (1) A notice of contest shall contain a short and plain statement of:

(i) The party's position with respect to each issue of law and fact that the party contends is pertinent; and

(ii) The relief requested by the party.

(2) A legible copy of the contested citation or order shall be attached to the notice of contest. If a legible copy is not available, the notice of contest shall set forth the text of the contested citation or order.

(f) *Answer.* Within 20 days after service of a notice of contest, the Secretary shall file an answer responding to each allegation of the notice of contest.

### § 2700.21 Effect of failure to file notice of contest of citation.

An operator's failure to file a notice of contest of a citation or order issued under section 104 of the Act, 30 U.S.C. 814, shall not preclude the operator from challenging, in a penalty proceeding, the fact of violation or any special findings contained in a citation or order including the assertion in the citation or order that the violation was of a significant and substantial nature or was caused by the operator's unwarrantable failure to comply with the standard.

### § 2700.22 Notice of contest of imminent danger withdrawal orders under section 107 of the Act.

(a) *Time to file.* A notice of contest of a withdrawal order issued under section 107 of the Act, 30 U.S.C. 817, or any modification or termination of the order, shall be filed with the Commission by the contesting party within 30 days of receipt of the order or any

modification or termination of the order.

(b) *Contents of notice of contest.* (1) A notice of contest shall contain a short and plain statement of:

(i) The contesting party's position on each issue of law and fact that the contesting party contends is pertinent; and

(ii) The relief requested by the contesting party.

(2) A legible copy of the contested order shall be attached to the notice of contest. If a legible copy is not available, the notice of contest shall set forth the text of the contested order.

(c) *Answer.* Within 15 days after service of the notice of contest, the Secretary shall file an answer responding to each allegation of the notice of contest.

#### § 2700.23 Review of a subsequent citation or order.

(a) The contesting party shall file any subsequent citation or order that modifies or terminates the citation or order under review within 30 days of its receipt. The notice of contest under section 105 or section 107 of the Act, 30 U.S.C. 815 and 817, unless withdrawn, shall be deemed to challenge any such subsequent citation or order.

(b) A person who is not a party in a pending proceeding for review of a citation or order may obtain review of a modification or termination of the citation or order by filing a notice of contest under section 105 or section 107 of the Act. The notice of contest shall be filed within 30 days of receipt of the citation or order that modifies or terminates the citation or order being reviewed.

### Subpart C—Contests of Proposed Penalties

#### § 2700.25 Proposed penalty assessment.

The Secretary, by certified mail, shall notify the operator or any other person against whom a penalty is proposed of the violation alleged, the amount of the proposed penalty assessment, and that such person shall have 30 days to notify the Secretary that he wishes to contest the proposed penalty assessment.

#### § 2700.26 Notice of contest of proposed penalty assessment.

A person has 30 days after receipt of the proposed penalty assessment within which to notify the Secretary that he contests the proposed penalty. The Secretary shall immediately transmit to the Commission the notice of contest.

#### § 2700.27 Effect of failure to contest proposed penalty assessment.

If, within 30 days from the receipt of the Secretary's proposed penalty assessment, the operator or other person fails to notify the Secretary that he contests the proposed penalty, the Secretary's proposed penalty assessment shall be deemed to be a final order of the Commission not subject to review by any court or agency.

#### § 2700.28 Filing of petition for assessment of penalty with the Commission.

(a) *Time to file.* Within 45 days of receipt of a timely contest of a proposed penalty assessment, the Secretary shall file with the Commission a petition for assessment of penalty.

(b) *Contents.* The petition for assessment of penalty shall list the alleged violations and the proposed penalties. Each violation shall be identified by the number and date of the citation or order and the section of the Act or regulations alleged to be violated. The petition for assessment of penalty shall state whether the citation or order has been contested and the docket number of any contest. The petition for assessment of penalty shall advise the party against whom a penalty is filed that he has 30 days to file an answer pursuant to § 2700.29.

(c) *Attachments.* A legible copy of each citation or order for which a penalty is sought shall be attached to the petition for assessment of penalty. If a legible copy is not available, the petition for assessment of penalty shall set forth the text of the citation or order.

#### § 2700.29 Answer.

A party against whom a petition for assessment of penalty is filed shall file an answer within 30 days after service of the petition for assessment of penalty. An answer shall include a short

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and plain statement responding to each allegation of the petition.

### § 2700.30 Assessment of penalty.

(a) In assessing a penalty the Judge shall determine the amount of penalty in accordance with the six statutory criteria contained in section 110(i) of the Act, 30 U.S.C. 820(i), and incorporate such determination in a written decision. The decision shall contain findings of fact and conclusions of law on each of the statutory criteria and an order requiring that the penalty be paid.

(b) In determining the amount of penalty, neither the Judge nor the Commission shall be bound by a penalty proposed by the Secretary or by any offer of settlement made by a party.

### § 2700.31 Penalty settlement.

(a) *General.* A proposed penalty that has been contested before the Commission may be settled only with the approval of the Commission upon motion.

(b) *Settlement motion.* A motion to approve a penalty settlement shall include the following information for each violation:

(1) The amount of the penalty proposed by the Secretary;

(2) The amount of the penalty agreed to in settlement; and

(3) Facts in support of the penalty agreed to by the parties.

(c) *Order approving settlement.* Any order by the Judge approving a settlement shall set forth the reasons for approval and shall be supported by the record. Such order shall become the final decision of the Commission 40 days after issuance unless the Commission has directed that the order be reviewed.

## Subpart D—Complaints for Compensation

### § 2700.35 Time to file.

A complaint for compensation under section 111 of the Act, 30 U.S.C. 821, shall be filed within 90 days after the beginning of the period during which the complainants are idled or would have been idled by the order that gives rise to the claim.

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### § 2700.36 Contents of complaint.

A complaint for compensation shall include:

(a) A short and plain statement of the facts giving rise to the claim, including the period for which compensation is claimed;

(b) The total amount of the compensation claimed, if known; and

(c) A legible copy of any pertinent order of withdrawal or, if a legible copy is not available, the text of the order.

### § 2700.37 Answer.

Within 30 days after service of a complaint for compensation, the operator shall file an answer responding to each allegation of the complaint.

## Subpart E—Complaints of Discharge, Discrimination or Interference

### § 2700.40 Who may file.

(a) *The Secretary.* A discrimination complaint under section 105(c)(2) of the Act, 30 U.S.C. 815(c)(2), shall be filed by the Secretary if, after an investigation conducted pursuant to section 105(c)(2), the Secretary determines that a violation of section 105(c)(1), 30 U.S.C. 815(c)(1), has occurred.

(b) *Miner, representative of miners, or applicant for employment.* A discrimination complaint under section 105(c)(3) of the Act, 30 U.S.C. 815(c)(3), may be filed by the complaining miner, representative of miners, or applicant for employment if the Secretary, after investigation, has determined that the provisions of section 105(c)(1) of the Act, 30 U.S.C. 815(c)(1), have not been violated.

### § 2700.41 Time to file.

(a) *The Secretary.* A discrimination complaint shall be filed by the Secretary within 30 days after his written determination that a violation has occurred.

(b) *Miner, representative of miners, or applicant for employment.* A discrimination complaint may be filed by a complaining miner, representative of miners, or applicant for employment within 30 days after receipt of a written determination by the Secretary that no violation has occurred.



**§ 2700.42 Contents of complaint.**

A discrimination complaint shall include a short and plain statement of the facts, setting forth the alleged discharge, discrimination or interference, and a statement of the relief requested.

**§ 2700.43 Answer.**

Within 30 days after service of a discrimination complaint, the respondent shall file an answer responding to each allegation of the complaint.

**§ 2700.44 Petition for assessment of penalty in discrimination cases.**

(a) *Petition for assessment of penalty in Secretary's complaint.* A discrimination complaint filed by the Secretary shall propose a civil penalty of a specific amount for the alleged violation of section 105(c) of the Act, 30 U.S.C. 815(c). The petition for assessment of penalty shall include a short and plain statement of supporting reasons based on the criteria for penalty assessment set forth in section 110(i) of the Act, 30 U.S.C. 820(i).

(b) *Petition for assessment of penalty after sustaining of complaint by miner, representative of miners, or applicant for employment.* Immediately upon issuance of a decision by a Judge sustaining a discrimination complaint brought pursuant to section 105(c)(3), 30 U.S.C. 815(c)(3), the Judge shall notify the Secretary in writing of such determination. The Secretary shall file with the Commission a petition for assessment of civil penalty within 45 days of receipt of such notice.

**§ 2700.45 Temporary reinstatement proceedings.**

(a) *Service of pleadings.* A copy of each document filed with the Commission in a temporary reinstatement proceeding shall be served on all parties by personal delivery, including courier service, by certified or registered mail, return receipt requested, express mail or, as specified in paragraph (f) of this section, by facsimile transmission.

(b) *Contents of application.* An application for temporary reinstatement shall state the Secretary's finding that the miner's discrimination complaint was not frivolously brought and shall be accompanied by an affidavit setting forth the Secretary's reasons sup-

porting his finding. The application also shall include a copy of the miner's complaint to the Secretary, and proof of notice to and service on the person against whom relief is sought by the most expeditious means of notice and delivery reasonably available.

(c) *Request for hearing.* Within 10 days following receipt of the Secretary's application for temporary reinstatement, the person against whom relief is sought shall advise the Commission's Chief Administrative Law Judge or his designee, and simultaneously notify the Secretary, whether a hearing on the application is requested. If no hearing is requested, the Judge assigned to the matter shall review immediately the Secretary's application and, if based on the contents thereof the Judge determines that the miner's complaint was not frivolously brought, he shall issue immediately a written order of temporary reinstatement. If a hearing on the application is requested, the hearing shall be held within 10 days following receipt of the request for hearing by the Commission's Chief Administrative Law Judge or his designee, unless compelling reasons are shown in an accompanying request for an extension of time.

(d) *Hearing.* The scope of a hearing on an application for temporary reinstatement is limited to a determination as to whether the miner's complaint was frivolously brought. The burden of proof shall be upon the Secretary to establish that the complaint was not frivolously brought. In support of his application for temporary reinstatement, the Secretary may limit his presentation to the testimony of the complainant. The respondent shall have an opportunity to cross-examine any witnesses called by the Secretary and may present testimony and documentary evidence in support of its position that the complaint was frivolously brought.

(e) *Order on application.* Within 7 days following the close of a hearing on an application for temporary reinstatement, the Judge shall issue a written order granting or denying the application. However, in extraordinary circumstances, the Judge's time for issuing an order may be extended as deemed necessary by the Judge. The

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Judge's order shall include findings and conclusions supporting the determination as to whether the miner's complaint has been frivolously brought. The parties shall be notified of his termination by the most expeditious means reasonably available. Service of the order granting or denying the application shall be by certified or registered mail, return receipt requested.

(f) *Review of order.* Review by the Commission of a Judge's written order granting or denying an application for temporary reinstatement may be sought by filing with the Commission a petition, which shall be captioned "Petition for Review of Temporary Reinstatement Order," with supporting arguments, within 5 days following receipt of the Judge's written order. The filing of any such petition is effective upon receipt. The filing and service of any pleadings under this rule may be made by facsimile transmission. The filing of a petition shall not stay the effect of the Judge's order unless the Commission so directs; a motion for such a stay will be granted only under extraordinary circumstances. Any response shall be filed within 5 days following service of a petition. Pleadings under this rule shall include proof of service on all parties by a means of delivery no less expeditious than that used for filing, except that if service by facsimile transmission is impossible, the filing party shall serve by a third-party commercial overnight delivery service or by personal delivery. The Commission's ruling on a petition shall be made on the basis of the petition and any response (any further briefs will be entertained only at the express direction of the Commission), and shall be rendered within 10 days following receipt of any response or the expiration of the period for filing such response. In extraordinary circumstances, the Commission's time for decision may be extended.

(g) *Dissolution of order.* If, following an order of temporary reinstatement, the Secretary determines that the provisions of section 105(c)(1), 30 U.S.C. 815(c)(1), have not been violated, the Judge shall be so notified and shall enter an order dissolving the order of reinstatement. An order dissolving the order of reinstatement shall not bar

the filing of an action by the miner in his own behalf under section 105(c)(3) of the Act, 30 U.S.C. 815(c)(3), and § 2700.40(b) of these rules.

[58 FR 12164, Mar. 3, 1993, as amended at 64 FR 48713, Sept. 8, 1999]

## Subpart F—Applications for Temporary Relief

### § 2700.46 Procedure.

(a) *When to file.* As provided in section 105(b)(2) of the Act, 30 U.S.C. 815(b)(2), an application for temporary relief from any modification or termination of any order or from any order issued under section 104 of the Act, 30 U.S.C. 814, may be filed at any time before such order becomes final. No temporary relief shall be granted with respect to a citation issued under section 104(a) or (f) of the Act, 30 U.S.C. 814(a) and (f).

(b) *Statements in opposition.* Any party opposing the application shall file a statement in opposition within 4 days after receipt of the application.

(c) *Prior hearing required.* Temporary relief shall not be granted prior to a hearing on such application.

### § 2700.47 Contents of application.

(a) An application for temporary relief shall contain:

(1) A showing of substantial likelihood that the findings and decision of the Judge or the Commission will be favorable to the applicant;

(2) A statement of the specific relief requested; and

(3) A showing that such relief will not adversely affect the health and safety of miners in the affected mine.

(b) An application for temporary relief may be supported by affidavits or other evidence.

## Subpart G—Hearings

### § 2700.50 Assignment of Judges.

Judges shall be assigned cases in rotation as far as practicable.

### § 2700.51 Hearing sites.

All cases will be assigned a hearing site by order of the Judge. The Judge shall give due regard to the convenience and necessity of the parties or

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their representatives and witnesses, the availability of suitable hearing facilities, and other relevant factors.

### § 2700.52 Expedition of proceedings.

(a) *Motions.* In addition to making a written motion pursuant to § 2700.10, a party may request expedition of proceedings by oral motion, with concurrent notice to all parties, or may file and serve such motion by facsimile. Oral motions shall be reduced to writing within 24 hours.

(b) *Timing of hearing.* Unless all parties consent to an earlier hearing, an expedited hearing on the merits of the case shall not be held on less than 4 days notice.

### § 2700.53 Prehearing conferences and statements.

(a) The Judge may require the parties to participate in a prehearing conference, either in person or by telephone. The participants at any such conference may consider and take action with respect to:

(1) The formulation and simplification of the issues;

(2) The possibility of obtaining stipulations, admissions of fact and of documents that will avoid unnecessary proof and advance rulings from the Judge on the admissibility of evidence;

(3) The exchange of exhibits and the names of witnesses and a synopsis of the testimony expected from each witness;

(4) The necessity or desirability of amendments to the pleadings and the joinder of parties;

(5) The possibility of agreement disposing of any or all of the issues in dispute;

(6) Such other matters as may aid in the expedition of the hearing or the disposition of the case.

(b) The Judge may also require the parties to submit prehearing statements addressing one or more of the matters set forth in paragraph (a) of this section.

### § 2700.54 Notice of hearing.

Except in expedited proceedings, written notice of the time, place, and nature of the hearing, the legal authority under which the hearing is to be held, and the matters of fact and law

asserted shall be given to all parties at least 20 days before the date set for hearing. The notice shall be mailed by certified or registered mail, return receipt requested.

### § 2700.55 Powers of Judges.

Subject to these rules, a Judge is empowered to:

(a) Administer oaths and affirmations;

(b) Issue subpoenas authorized by law;

(c) Rule on offers of proof and receive relevant evidence;

(d) Order depositions to be taken;

(e) Regulate the course of the hearing;

(f) Hold conferences for the settlement or simplification of the issues;

(g) Dispose of procedural requests or similar matters;

(h) Make decisions in the proceedings before him, provided that he shall not be assigned to make a recommended decision; and

(i) Take other action authorized by these rules, by 5 U.S.C. 556, or by the Act.

### § 2700.56 Discovery; general.

(a) *Discovery methods.* Parties may obtain discovery by one or more of the following methods: Depositions upon oral examination or written questions; written interrogatories; or requests for admissions, for production of documents or objects or for permission to enter upon property for inspecting, copying, photographing, and gathering information.

(b) *Scope of discovery.* Parties may obtain discovery of any relevant, non-privileged matter that is admissible evidence or appears likely to lead to the discovery of admissible evidence.

(c) *Limitation of discovery.* Upon motion by a party or by the person from whom discovery is sought or upon his own motion, a Judge may, for good cause shown, limit discovery to prevent undue delay or to protect a party or person from oppression or undue burden or expense.

(d) *Initiation of discovery.* Discovery shall be initiated within 20 days after an answer to a notice of contest, an answer to a petition for assessment of penalty, or an answer to a complaint

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under section 105(c) or 111 of the Act has been filed. 30 U.S.C. 815(c) and 30 U.S.C. 821. For good cause shown, the Judge may permit discovery to be initiated after that date.

(e) *Completion of discovery.* Discovery shall be completed within 40 days after its initiation. For good cause shown, the Judge may extend the time for discovery.

### § 2700.57 Depositions.

(a) *Generally.* Any party, without leave of the Judge, may take the testimony of any person, including a party, by deposition upon oral examination or written interrogatories.

(b) *Orders for deposition.* If the parties are unable to agree, the time, place, and manner of taking depositions shall be governed by order of the Judge.

### § 2700.58 Interrogatories, requests for admissions and requests for production of documents.

(a) *Interrogatories.* Any party, without leave of the Judge, may serve written interrogatories upon another party. A party served with interrogatories shall answer each interrogatory separately and fully in writing under oath within 25 days of service unless the proponent of the interrogatories agrees to a longer time. The Judge may order a shorter or longer time period for responding. A party objecting to an interrogatory shall state the basis for the objection in its answer.

(b) *Requests for admissions.* Any party, without leave of the Judge, may serve on another party a written request for admissions. A party served with a request for admissions shall respond to each request separately and fully in writing within 25 days of service, unless the party making the request agrees to a longer time. The Judge may order a shorter or longer time period for responding. A party objecting to a request for admissions shall state the basis for the objection in its response. Any matter admitted under this rule is conclusively established for the purpose of the pending proceeding unless the Judge, on motion, permits withdrawal or amendment of the admission.

(c) *Request for production, entry or inspection.* Any party, without leave of the Judge, may serve on another party

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a written request to produce and permit inspection, copying or photocopying of designated documents or objects, or to permit a party or his agent to enter upon designated property to inspect and gather information. A party served with such a request shall respond in writing within 25 days of service unless the party making the request agrees to a longer time. The Judge may order a shorter or longer period for responding. A party objecting to a request for production, entry or inspection shall state the basis for the objection in its response.

### § 2700.59. Failure to cooperate in discovery; sanctions.

Upon the failure of any person, including a party, to respond to a discovery request or upon an objection to such a request, the party seeking discovery may file a motion with the Judge requesting an order compelling discovery. If any person, including a party, fails to comply with an order compelling discovery, the Judge may make such orders with regard to the failure as are just and appropriate, including deeming as established the matters sought to be discovered or dismissing the proceeding in favor of the party seeking discovery. For good cause shown the Judge may excuse an objecting party from complying with the request.

### § 2700.60 Subpoenas.

(a) *Compulsory attendance of witnesses and production of documents.* The Commission and its Judges are authorized to issue subpoenas, on their own motion or on the oral or written application of a party, requiring the attendance of witnesses and the production of documents or physical evidence. A subpoena may be served by any person who is at least 18 years of age. A subpoena may also be served by registered or certified mail, return receipt requested, but, in such case, any risk of delivery is on the serving party. A copy of the subpoena bearing a certificate of service shall be filed with the Commission or the Judge.

(b) *Fees payable to witnesses.* Subpoenaed witnesses shall be paid the same fees and mileage as are paid in the district courts of the United States. The

witness fees and mileage shall be paid by the party at whose request the witness appears, or by the Commission if a witness is subpoenaed on the motion of the Commission or a Judge. This paragraph does not apply to Government employees who are called as witnesses by the Government.

(c) *Motions to revoke or modify subpoenas.* Any person served with a subpoena may move within 5 days of service or at the hearing, whichever is sooner, to revoke or modify the subpoena. The Commission or the Judge, as appropriate, shall revoke or modify the subpoena if it seeks information outside the proper scope of discovery as set forth in § 2700.56(b); or if it does not describe with sufficient particularity the evidence required to be produced; or if for any other reason it is found to be invalid or unreasonable. The Commission or the Judge shall set forth a concise statement of the grounds for such ruling.

(d) *Availability of transcript.* Persons compelled to submit evidence at a public proceeding are entitled to obtain, on payment of prescribed costs, a transcript of that part of the proceeding that sets forth their testimony or refers to their production of evidence.

(e) *Failure to comply.* Upon the failure of any person to comply with an order to testify or with a subpoena issued by the Commission or the Judge, the Judge or the Commission's General Counsel, at the request of the Judge or at the direction of the Commission, may undertake to initiate proceedings in the appropriate district court of the United States for the enforcement of the subpoena.

#### § 2700.61 Name of miner informant.

A Judge shall not, except in extraordinary circumstances, disclose or order a person to disclose to an operator or his agent the name of an informant who is a miner.

#### § 2700.62 Name of miner witness.

A Judge shall not, until 2 days before a hearing, disclose or order a person to disclose to an operator or his agent the name of a miner who is expected by the Judge to testify or whom a party expects to summon or call as a witness.

#### § 2700.63 Evidence; presentation of case.

(a) Relevant evidence, including hearsay evidence, that is not unduly repetitious or cumulative is admissible.

(b) The proponent of an order has the burden of proof. A party shall have the right to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts.

#### § 2700.64 Retention of exhibits.

All exhibits received in evidence in a hearing or submitted for the record in any proceeding before the Commission shall be retained with the official record of the proceeding. The withdrawal of original exhibits may be permitted by the Commission or the Judge, upon request and after notice to the other parties, if true copies are substituted, where practical, for the originals.

#### § 2700.65 Proposed findings, conclusions and orders.

The Judge may require the submission of proposed findings of fact, conclusions of law, and orders, together with supporting briefs. The proposals shall be served upon all parties, and shall contain adequate references to the record and authorities.

#### § 2700.66 Summary disposition of proceedings.

(a) *Generally.* When a party fails to comply with an order of a Judge or these rules, except as provided in paragraph (b) of this section, an order to show cause shall be directed to the party before the entry of any order of default or dismissal. The order shall be mailed by registered or certified mail, return receipt requested.

(b) *Failure to attend hearing.* If a party fails to attend a scheduled hearing, the Judge, where appropriate, may find the party in default or dismiss the proceeding without issuing an order to show cause.

(c) *Penalty proceedings.* When the Judge finds a party in default in a civil penalty proceeding, the Judge shall

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also enter an order assessing appropriate penalties and directing that such penalties be paid.

### § 2700.67 Summary decision of the Judge.

(a) *Filing of motion for summary decision.* At any time after commencement of a proceeding and no later than 10 days before the date fixed for the hearing on the merits, a party may move the Judge to render summary decision disposing of all or part of the proceeding.

(b) *Grounds.* A motion for summary decision shall be granted only if the entire record, including the pleadings, depositions, answers to interrogatories, admissions, and affidavits, shows:

(1) That there is no genuine issue as to any material fact; and

(2) That the moving party is entitled to summary decision as a matter of law.

(c) *Form of motion and affidavits.* The motion may be supported by affidavits or other verified documents, and shall specify the grounds upon which the party seeks relief. Supporting and opposing affidavits shall be made on personal knowledge and shall show affirmatively that the affiant is competent to testify to the matters stated. Sworn or certified copies of all papers or parts of papers referred to in an affidavit shall be attached to the affidavit or be incorporated by reference if not otherwise a matter of record. The Judge shall permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, admissions or further affidavits. When a motion for summary decision is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleadings, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for a hearing. If the party does not respond, summary decision, if appropriate, shall be entered against him.

(d) *Case not fully adjudicated on motion.* If a motion for summary decision is denied in whole or in part, the Judge shall ascertain what material facts are controverted and shall issue an order

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directing further proceedings as appropriate.

### § 2700.68 Substitution of the Judge.

(a) *Generally.* Should a Judge become unavailable to the Commission, the proceedings assigned to him shall be reassigned to a substitute Judge.

(b) *Substitution following a hearing.* The substitute Judge may render a decision based upon the existing record, provided the parties are notified of his intent and they are given an opportunity to object. An objection to the Judge rendering a decision based upon the existing record shall be filed within 10 days following receipt of the Judge's notice, or the objection shall be deemed to be waived. An objection shall be founded upon a showing of a need for the resolution of conflicting material testimony requiring credibility determinations. Upon good cause shown the Judge may order a further hearing on the merits, which shall be limited, so far as practicable, to the testimony in dispute.

### § 2700.69 Decision of the Judge.

(a) *Form and content of the Judge's decision.* The Judge shall make a decision that constitutes his final disposition of the proceedings. The decision shall be in writing and shall include all findings of fact and conclusions of law, and the reasons or bases for them, on all the material issues of fact, law or discretion presented by the record, and an order. If a decision is announced orally from the bench, it shall be reduced to writing after the filing of the transcript. An order by a Judge approving a settlement proposal is a decision of the Judge.

(b) *Termination of the Judge's jurisdiction.* The jurisdiction of the Judge terminates when his decision has been issued.

(c) *Correction of clerical errors.* At any time before the Commission has directed that a Judge's decision be reviewed, and on his own motion or the motion of a party, the Judge may correct clerical errors in decisions, orders or other parts of the record. After the Commission has directed that a Judge's decision be reviewed, the Judge may correct such errors with the leave

of the Commission. If a Judge's decision has become the final order of the Commission, the Judge may correct such errors with the leave of the Commission.

### Subpart H—Review by the Commission

#### § 2700.70 Petitions for discretionary review.

(a) *Procedure.* Any person adversely affected or aggrieved by a Judge's decision or order may file with the Commission a petition for discretionary review within 30 days after issuance of the decision or order. Filing of a petition for discretionary review, including a facsimile transmission, is effective upon receipt. Two or more parties may join in the same petition; the Commission may consolidate related petitions. Procedures governing petitions for review of temporary reinstatement orders are found at § 2700.45(f).

(b) *Review discretionary.* Review by the Commission shall not be a matter of right but of the sound discretion of the Commission. Review by the Commission shall be granted only by affirmative vote of at least two of the Commissioners present and voting.

(c) *Grounds.* Petitions for discretionary review shall be filed only upon one or more of the following grounds:

(1) A finding or conclusion of material fact is not supported by substantial evidence;

(2) A necessary legal conclusion is erroneous;

(3) The decision is contrary to law or to the duly promulgated rules or decisions of the Commission;

(4) A substantial question of law, policy, or discretion is involved; or

(5) A prejudicial error of procedure was committed.

(d) *Requirements.* Each issue shall be separately numbered and plainly and concisely stated, and shall be supported by detailed citations to the record, when assignments of error are based on the record, and by statutes, regulations, or other principal authorities relied upon. Except by permission of the Commission and for good cause shown, petitions for discretionary review shall not exceed 35 pages. Except for good cause shown, no assignment of

error by any party shall rely on any question of fact or law upon which the Judge had not been afforded an opportunity to pass.

(e) *Statement in opposition to petition.* A statement in opposition to a petition for discretionary review may be filed, but the opportunity for such filing shall not require the Commission to delay its action on the petition.

(f) *Motion for leave to exceed page limit.* A motion requesting leave to exceed the page limit shall be received not less than 3 days prior to the date the petition for discretionary review is due to be filed, shall state the total number of pages proposed, and shall comply with § 2700.10. A motion requesting an extension of page limit and a statement in opposition to such a motion may be filed and served by facsimile. Filing of a motion requesting an extension of page limit, including a facsimile transmission, is effective upon receipt. The motion and any statement in opposition shall include proof of service on all parties by a means of delivery no less expeditious than that used for filing the motion, except that if service by facsimile transmission is impossible, the filing party shall serve by a third-party commercial overnight delivery service or by personal delivery.

(g) *Scope of review.* If a petition is granted, review shall be limited to the issues raised by the petition, unless the Commission directs review of additional issues pursuant to § 2700.71.

(h) *Denial of petition.* A petition not granted within 40 days after the issuance of the Judge's decision is deemed denied.

[58 FR 12164, Mar. 3, 1993, as amended at 64 FR 48713, Sept. 8, 1999]

#### § 2700.71 Review by the Commission on its own motion.

At any time within 30 days after the issuance of a Judge's decision, the Commission may, by the affirmative vote of at least two of the Commissioners present and voting, direct the case for review on its own motion. Review shall be directed only upon the ground that the decision may be contrary to law or Commission policy or that a novel question of policy has been presented. The Commission shall

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state in such direction for review the specific issue of law, Commission policy, or novel question of policy to be reviewed. Review shall be limited to the issues specified in such direction for review.

### § 2700.72 Unreviewed decisions.

An unreviewed decision of a Judge is not a precedent binding upon the Commission.

### § 2700.73 Procedure for intervention.

After the Commission has directed a case for review, a person may move to intervene. A motion to intervene shall be filed within 30 days after the Commission's direction for review unless the Commission, for good cause shown, allows a later filing. Intervention before the Commission shall not be a matter of right but of the sound discretion of the Commission. The movant shall set forth:

(a) A legally protectible interest directly relating to the property or events that are the subject of the case on review;

(b) A showing that the disposition of the proceeding may impair or impede his ability to protect that interest;

(c) The reasons why the movant's interest is not adequately represented by parties already involved in the proceeding; and

(d) The reasons why the movant should be excused for failing to file for intervention before the Judge. A motion for intervention shall also show that the granting of the motion will not unduly delay the proceeding or prejudice any party and shall explain why the movant's participation as an amicus curiae would be inadequate. If the Commission permits intervention, the Commission's order shall specify the time within which the intervenor's brief and any response or reply may be filed. In denying a motion to intervene, the Commission may alternatively permit the movant to participate in the proceeding as amicus curiae.

### § 2700.74 Procedure for participation as amicus curiae.

(a) After the Commission has directed a case for review, any person may move to participate as amicus curiae. Such participation before the

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Commission shall not be a matter of right but of the sound discretion of the Commission. A motion for participation as amicus curiae shall set forth the interest of the movant and show that the granting of the motion will not unduly delay the proceeding or prejudice any party. The movant may conditionally attach its brief to its motion for participation as amicus curiae.

(b) The brief of an amicus curiae shall be filed within the initial briefing period (see § 2700.75(a)(1)) allotted to the party whose position the amicus curiae supports.

(c) In the interest of avoiding duplication of argument, however, the Commission may permit the filing of an amicus curiae brief within 20 days after the close of the briefing period set forth in § 2700.75(a)(1), provided that the amicus curiae's motion for participation as an amicus curiae is filed within the initial briefing period (see § 2700.75(a)(1)) allotted to the party whose position the amicus curiae supports. If the Commission grants any such motion, the Commission's order shall specify the time within which a response or reply may be made to the amicus curiae brief.

[58 FR 12164, Mar. 3, 1993, as amended at 64 FR 48714, Sept. 8, 1999]

### § 2700.75 Briefs.

(a) *Time to file*—(1) *Opening and response briefs*. Within 30 days after the Commission grants a petition for discretionary review, the petitioner shall file his opening brief. If the petitioner desires, he may notify the Commission and all other parties within the 30-day period that his petition and any supporting memorandum are to constitute his brief. Other parties may file response briefs within 30 days after the petitioner's brief is served. If the Commission directs review on its own motion, all parties shall file any opening briefs within 30 days of the direction for review. In such cases, a party may file a response brief within 20 days after service of the opposing party's opening brief.

(2) *Reply briefs*. In cases where the Commission has granted a petition for discretionary review, the petitioner may file a reply brief within 20 days after the service of the response briefs.



(b) *Additional briefs.* No further briefs shall be filed except by leave of the Commission.

(c) *Length of brief.* Except by permission of the Commission and for good cause shown, opening and response briefs shall not exceed 35 pages, and reply briefs shall not exceed 15 pages. A brief of an amicus curiae shall not exceed 25 pages. A brief of an intervenor shall not exceed the page limitation applicable to the party whose position it supports in affirming or reversing the Judge, or if a different position is taken, such brief shall not exceed 25 pages. Tables of contents or authorities shall not be counted against the length of a brief.

(d) *Motion for extension of time.* A motion for an extension of time to file a brief shall comply with § 2700.9. The Commission may decline to accept a brief that is not timely filed.

(e) *Consequences of petitioner's failure to file brief.* If a petitioner fails to timely file a brief or to designate the petition as his brief, the direction for review may be vacated.

(f) *Motion for leave to exceed page limit.* A motion requesting leave to exceed the page limit for a brief shall be received not less than 3 days prior to the date the brief is due to be filed, shall state the total number of pages proposed, and shall comply with § 2700.10. A motion requesting an extension of page limit and a statement in opposition to such a motion may be filed and served by facsimile. Filing of a motion requesting an extension of page limit, including a facsimile transmission, is effective upon receipt. The motion and any statement in opposition shall include proof of service on all parties by a means of delivery no less expeditious than that used for filing the motion, except that if service by facsimile transmission is impossible, the filing party shall serve by a third-party commercial overnight delivery service or by personal delivery.

(g) *Number of copies.* As provided in § 2700.5(e), each party shall file seven copies of its brief. If the filing party is not represented by a lawyer or other representative, one copy shall be sufficient.

[58 FR 12164, Mar. 3, 1993, as amended at 64 FR 48714, Sept. 8, 1999]

#### § 2700.76 Interlocutory review.

(a) *Procedure.* Interlocutory review by the Commission shall not be a matter of right but of the sound discretion of the Commission. Procedures governing petitions for review of temporary reinstatement orders are found at § 2700.45(f).

(1) Review cannot be granted unless:

(i) The judge has certified, upon his own motion or the motion of a party, that his interlocutory ruling involves a controlling question of law and that in his opinion immediate review will materially advance the final disposition of the proceeding; or

(ii) The Judge has denied a party's motion for certification of the interlocutory ruling to the Commission, and the party files with the Commission a petition for interlocutory review within 30 days of the Judge's denial of such motion for certification.

(2) In the case of either paragraph (a)(1)(i) or (ii) of this section, the Commission, by a majority vote of the full Commission or a majority vote of a duly constituted panel of the Commission, may grant interlocutory review upon a determination that the Judge's interlocutory ruling involves a controlling question of law and that immediate review may materially advance the final disposition of the proceeding. Interlocutory review by the Commission shall not operate to suspend the hearing unless otherwise ordered by the Commission. Any grant or denial of interlocutory review shall be by written order of the Commission.

(b) *Petitions for interlocutory review.* Where the Judge denies a party's motion for certification of an interlocutory ruling and the party seeks interlocutory review, a petition for interlocutory review shall be in writing and shall not exceed 15 pages. A copy of the Judge's interlocutory ruling sought to be reviewed and of the Judge's order denying the petitioner's motion for certification shall be attached to the petition.

(c) *Briefs.* When the Commission grants interlocutory review, the parties shall file briefs not to exceed 25 pages within 20 days of the order granting interlocutory review unless otherwise ordered by the Commission.

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(d) *Scope of review.* Unless otherwise specified in the Commission's order granting interlocutory review, review shall be confined to the issues raised in the Judge's certification or to the issues raised in the petition for interlocutory review.

[58 FR 12164, Mar. 3, 1993, as amended at 64 FR 48714, Sept. 8, 1999; 67 FR 18485, Apr. 16, 2002]

### § 2700.77 Oral argument.

Oral argument may be ordered by the Commission on its own motion or on the motion of a party. A party requesting oral argument shall do so by separate motion no later than the time that it files its opening or response brief.

### § 2700.78 Reconsideration.

(a) A petition for reconsideration must be filed with the Commission within 10 days after a decision or order of the Commission. Any response must be filed with the Commission within 10 days of service of the petition.

(b) Unless the Commission orders otherwise, the filing of a petition for reconsideration shall not stay the effect of a decision or order of the Commission and shall not affect the finality of a decision or order for purposes of review in the courts.

### § 2700.79 Correction of clerical errors.

The Commission may correct clerical errors in its decisions at any time.

## Subpart I—Miscellaneous

### § 2700.80 Standards of conduct; disciplinary proceedings.

(a) *Standards of conduct.* Individuals practicing before the Commission and Commission Judges shall conform to the standards of ethical conduct required of practitioners in the courts of the United States.

(b) *Grounds.* Disciplinary proceedings may be instituted against anyone who is practicing or has practiced before the Commission on grounds that such person has engaged in unethical or unprofessional conduct; has failed to comply with these rules or an order of the Commission or its Judges; has been disbarred or suspended by a court or

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administrative agency; or has been disciplined by a Judge under paragraph (e) of this section.

(c) Disciplinary proceedings shall be subject to the following procedure:

(1) *Disciplinary referral.* Except as provided in paragraph (e) of this section, a Judge or other person having knowledge of circumstances that may warrant disciplinary proceedings against an individual who is practicing or has practiced before the Commission shall forward to the Commission for action such information in the form of a written disciplinary referral. Whenever the Commission receives a disciplinary referral, the matter shall be assigned a docket number.

(2) *Inquiry by the Commission.* The Commission shall conduct an inquiry concerning a disciplinary referral and shall determine whether disciplinary proceedings are warranted. The Commission may require persons to submit affidavits setting forth their knowledge of relevant circumstances. If the Commission determines that disciplinary proceedings are not warranted, it shall issue an order terminating the referral.

(3) *Transmittal and hearing.* Whenever, as a result of its inquiry, the Commission, by a majority vote of the full Commission or a majority vote of a duly constituted panel of the Commission, determines that the circumstances warrant a hearing, the Commission's Chief Administrative Law Judge shall assign the matter to a Judge, other than the referring Judge, for hearing and decision. The Commission shall specify the disciplinary issues to be resolved through hearing and may designate counsel to prosecute the matter before the Judge. The Judge shall provide the opportunity for reply and hearing on the specific disciplinary matters at issue. The individual shall have the opportunity to present evidence and cross-examine witnesses. The Judge's decision shall include findings of fact and conclusions of law and either an order dismissing the proceedings or an appropriate disciplinary order, which may include reprimand, suspension, or disbarment from practice before the Commission.

(d) *Appeal from Judge's decision.* Any person adversely affected or aggrieved by the Judge's decision is entitled to

review by the Commission. A person seeking such review shall file a notice of appeal with the Commission within 30 days after the issuance of the Judge's decision.

(e) *Misconduct before a Judge.* A Judge may order the removal of any person, including a representative of a party, who engages in disruptive conduct in the Judge's presence. If a representative is ordered removed, the Judge shall allow the party represented by the person a reasonable time to engage another representative. In all instances of removal of a person for disruptive conduct, the Judge shall place in the record a written statement on the matter. A party aggrieved by a Judge's order of removal may appeal by requesting interlocutory review pursuant to § 2700.76 or, alternatively, may assign the Judge's ruling as error in a petition for discretionary review.

#### § 2700.81 Recusal and disqualification.

(a) *Recusal.* A Commissioner or a Judge may recuse himself from a proceeding whenever he deems such action appropriate.

(b) *Request to withdraw.* A party may request a Commissioner or a Judge to withdraw on grounds of personal bias or other disqualification. A party shall make such a request by promptly filing an affidavit setting forth in detail the matters alleged to constitute personal bias or other grounds for disqualification.

(c) *Procedure if Commissioner or Judge does not withdraw.* If, upon being requested to withdraw pursuant to paragraph (b) of this section, the Commissioner or the Judge does not withdraw from the proceeding, he shall so rule upon the record, stating the grounds for his ruling. If the Judge does not withdraw, he shall proceed with the hearing, or, if the hearing has been completed, he shall proceed with the issuance of his decision, unless the Commission stays the hearing or further proceedings upon the granting of a petition for interlocutory review of the Judge's decision not to withdraw.

#### § 2700.82 Ex parte communications.

(a) For purposes of this section, the following definitions shall apply:

(1) *Ex parte communication* means an oral or written communication not on the public record concerning any matter or proceeding with respect to which reasonable prior notice to all parties has not been given. A status or informational request does not constitute an ex parte communication.

(2) *Status or informational request* means a request for a status report on any matter or proceeding or a request concerning filing requirements or other docket information.

(3) *Merits of a case*, which shall be broadly construed by the Commission, includes discussion of the factual or legal issues in a case or resolution of those issues.

(b) *Prohibited ex parte communication.* There shall be no ex parte communication with respect to the merits of a case not concluded, between the Commission, including any member, Judge, officer, or agent of the Commission who is employed in the decisional process, and any of the parties, intervenors, representatives, amici, or other interested persons.

(c) *Procedure in case of violation.* (1) In the event a prohibited ex parte communication occurs, the Commission or the Judge may make such orders or take such action to remedy the effect of the ex parte communication as circumstances require. Upon notice and hearing, the Commission may take disciplinary action against any person who knowingly and willfully makes or causes to be made a prohibited ex parte communication.

(2) A memorandum setting forth all ex parte communications, whether prohibited or not, shall be placed on the public record of the proceeding.

(d) *Inquiries.* Any inquiries concerning filing requirements, the status of cases before the Commission, or docket information shall be directed to the Office of General Counsel or the Docket Office of the Federal Mine Safety and Health Review Commission, 601 New Jersey Avenue, NW., Suite 9500, Washington, DC 20001.

[58 FR 12164, Mar. 3, 1993, as amended at 67 FR 60862, Sept. 27, 2002]

#### § 2700.83 Authority to sign orders.

The Chairman or other designated Commissioner is authorized to sign on

## § 2700.84

behalf of the Commissioners, orders disposing of the following procedural motions: motions for extensions of time, motions for permission to file briefs in excess of page limits, motions to accept late filed briefs, motions to consolidate, motions to expedite proceedings, motions for oral argument, and similar procedural motions. A person aggrieved by such an order may, within 10 days of the date of the order, file a motion requesting that the order be signed by the participating Commissioners.

### § 2700.84 Effective date.

These rules are effective on May 3, 1993 and apply to cases initiated after they take effect. They also apply to further proceedings in cases then pending, except to the extent that application of the rules would not be feasible, or would work injustice, in which event the former rules of procedure apply.

## PART 2701—GOVERNMENT IN THE SUNSHINE ACT REGULATIONS

Sec.

2701.1 Purpose and scope.

2701.2 Open meetings policy; closure of meetings.

2701.3 Announcement of meetings.

2701.4 Request to open or close meeting.

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2701.6 Discussion during open meetings.

2701.7 Expedited closing procedure.

AUTHORITY: Sec. 113, Federal Mine Safety and Health Act of 1977, Pub. L. 95-165 (30 U.S.C. 823).

SOURCE: 44 FR 2575, Jan. 12, 1979, unless otherwise noted.

### § 2701.1 Purpose and scope.

(a) *Purpose.* The purpose of this part is to implement the Government in the Sunshine Act, 5 U.S.C. 552b. The rules in this part are intended to open, to the extent practicable, the meetings of the Commission to public observation while preserving the Commission's ability to fulfill its responsibilities and respect the interests of persons in confidential consideration of sensitive matters.

(b) *Scope.* This part applies to all meetings of the Commission. A "meeting of the Commission" means a joint deliberation in person or by conference

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telephone call of at least a majority of either the members of the Commission or of a panel of three or more Commissioners that determines or results in the joint conduct or disposition of official Commission business, but does not include (1) deliberations regarding a decision to open or close a meeting, to withhold information about a meeting, and the circumstances of meetings, such as their time, place, and subject matter, and (2) the individual deliberations of Commission members of matters considered upon circulated documents or other notation procedure.

### § 2701.2 Open meetings policy; closure of meetings.

(a) *Policy.* Commission meetings will generally be open to public observation, including meetings concerning the disposition by the Commission of a formal adjudication. See 5 U.S.C. 522b(c)(10).

(b) *Closure.* Meetings may be closed, or certain information about a meeting may not be disclosed under the circumstances contemplated by 5 U.S.C. 522b(c)(1)-(10), and under the procedures specified by 5 U.S.C. 552b (d) and (f). Commission employees may attend closed meetings of the commission unless the notice of a closed meeting states otherwise.

### § 2701.3 Announcement of meetings.

(a) *Generally.* The Commission shall publicly announce and submit to the FEDERAL REGISTER at least 7 days before a meeting, the time, place, subject matter of a meeting, whether it is to be open or closed, and the name and phone number of the Commission employee who will respond to requests for information about the meeting. The description of the subject matter of a meeting at which the Commission will consider adjudicatory matters, shall include the names and docket numbers of the cases to be considered. The Commission shall also contact, by phone or mail, the parties to the cases to be considered at the meeting, shall post a copy of a notice of the meeting at the Office of Public Information, shall mail notices to persons who have requested inclusion of their names on a meeting mailing list, and may issue press releases.